TO: Sunshine Task Force
FROM: Bob Brownstein
SUBJECT: Public Official Calendars: Exemptions to Release of Information
DATE: 2/20/07

Recommendation:

1) Public officials should not be required to disclose meetings with individuals or groups under the following circumstances:

A) Whistleblowers

Whistleblowers are defined as those who report a violation of law, city policy, or other incident of wrongdoing.

B) Fear of Retaliation

The fear of retaliation may be based on the situational vulnerability of a person or group. For example, employees may fear to oppose the public policies endorsed by their employer or tenants may be unwilling to publicly disagree with the position of a landlord. Fear of retaliation may also be based on the fact that a group perceives its viewpoint to be highly controversial or unpopular.

2) Public officials who seek to prevent disclosure of a meeting based on these grounds must submit a memo indicating the reasons for the exemption to the City Attorney prior to the time of the meeting. The City Attorney may request additional information and may reject the public official's request. All communication between the officials and the city attorney on these matters are protected on grounds of attorney-client privilege.

Reasons for Recommendation:

Public officials do not only meet with lobbyists and representatives of powerful interest groups. They also meet with those who are relatively powerless and are petitioning government for protection against other groups who are antagonistic to their needs or values. These people may require the cloak of anonymity if they are to experience access to government without enduring unacceptable risks.

I recognize that there is a possibility that allowing exemptions of this type may lead to abuse. However, this entire "open calendar" requirement is essentially an honor code. Unless we are to place public officials under 24/7 surveillance, any official can arrange an unnoticed and unreported meeting if he or she chooses to do so. With these guidelines, the Task Force will provide those officials who do want to honor the goals of open government the ability to do so while still permitting realistic access to their most vulnerable constituents.

While most of the work of the Sunshine Task Force has been driven by the philosophical imperative of opening government and politics to public scrutiny, it is

important that we also remember that the protection of the rights of those with unpopular or minority views is also a valued part of our democratic traditions. To illustrate the ethical foundation of this perspective, I offer below a few citations from opinions of the United States Supreme Court. The opinions are not employed to raise a legal argument; they are presented because they clearly and sometimes eloquently present the case for privacy in political life.

1) N.A.A.C.P vs. Alabama (1958)

In this case, the state of Alabama sought to require the N.A.A.C.P to reveal its membership list to the public.

In delivering the opinion of the Court, Justice Harlan wrote,

"…This Court has recognized the vital relationship between freedom to associate and privacy in one's associations… Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

"Petitioner /NAACP/ has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility…. It is not enough to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold."

"We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."

2) McIntyre v Ohio Elections Commission (1995)

In this case, the State of Ohio sought to prohibit the distribution of unsigned leaflets regarding an election. Margaret McIntyre had drafted and distributed anonymous leaflets opposing a proposed school tax increase.

In delivering the opinion of the Court, Justice Stevens wrote,

"The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices…Writing for the Court, Justice Black noted that 'persecuted groups from time to time throughout history have been able to criticize

oppressive practices and laws either anonymously or not at all'…Justice Black reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names…The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard won right to vote one's conscience without fear of retaliation."

"Of course, core political speech need not center on a candidate for office…Indeed, the speech in which Mrs. McIntyre engaged…handing out leaflets in the advocacy of a politically controversial viewpoint – is the essence of First Amendment expression….That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed…No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's."

"Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority…It thus exemplifies the purpose behind the Bill of Rights and of the first amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the danger of its misuse."